

DC-18-19390  
CAUSE NO.

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3. Plaintiff, Joseph Cooper, is an individual who resides in Dallas County, Texas.

4. Defendant Bennett, Weston, LaJone & Turner, P.C. (“BWLTL”) is a law firm  
ing law and doing business in Dallas, Texas and may be served with process through its

registered agent, Mark E. Bennett, 1750 Valley View Lane, Suite 120, Dallas, Texas 75234, or wherever its registered agent may be found.

5. Defendant J. Michael Weston (“Weston”) is a practicing attorney who is a Partner at Bennett, Weston, LaJone & Turner, P.C. Mr. Weston represented Mr. Cooper as his counsel in the claims made the basis of this lawsuit. Bennett, Weston, LaJone & Turner, P.C. is located at 1603 Lyndon B. Johnson Fwy, Ste. 280, Dallas, Texas 75234. Mr. Weston can be served at his law practice at 1603 Lyndon B. Johnson Fwy, Ste. 280, Dallas, Texas 75234, or wherever he may be found.

6. Defendant Casey S. Erick (“Erick”) is a practicing attorney who is a Partner at Kessler Collins. Mr. Erick, like Mr. Weston, represented Mr. Cooper as his counsel in in the claims made the basis of this lawsuit. Mr. Erick can be served at his place of business, Kessler Collins, 2100 Ross Avenue, Suite 750, Dallas, Texas 75201, or wherever he may be found.

#### **IV. RULE 28 MOTION**

7. Pursuant to Tex. R. Civ. P. 28, Plaintiff moves that any partnership, unincorporated association, private corporation, or individual doing business under an assumed name substitute a true name.

#### **V. JURISDICTION**

8. Damages sought are within the jurisdictional limits of this Court.

#### **VI. VENUE**

9. Venue is proper in Dallas County, Texas, because all or a substantial part of the events or omissions giving rise to the claim occurred there.

#### **VII. CONDITIONS PRECEDENT**

10. All conditions precedent have been performed or have occurred.

## **VIII. FACTS**

### **A. THE LEGAL MALPRACTICE CASE**

11. Plaintiff Joseph Cooper (“Cooper”) is a videographer who has worked tirelessly throughout his life to grow his small business. Over twenty-five years ago, Cooper took a chance by agreeing to tape and edit video footage for a then-struggling Dallas comedian named Steve Harvey (“Harvey”). Cooper worked hundreds of hours over many months for very little compensation. As Harvey’s popularity began to rise as an actor, comedian, and game show host, so did the value of the tapes created by Cooper so many years ago.

12. Cooper was finally in a position to reap the rewards of the hard labor sown decades earlier, as distributors and the public became interested in getting a glimpse into Harvey’s formative years as an entertainer. Harvey did not share the sentiment, however. He and his attorneys repeatedly interfered in Cooper’s business deals by sending threatening letters to prospective distributors and even suing Cooper directly in Dallas County District Court in 1998. Harvey’s suit was ultimately dismissed by the court for want of prosecution. This did not dissuade Harvey from continuing to maliciously undermine Cooper’s efforts to license the tapes for distribution.

13. Cooper finally had enough of Harvey’s bullying. To that end, Cooper retained the law firm of Bennett, Weston, LaJone & Turner, P.C. (“BWLTL”) to seek a declaratory judgment affirming Cooper’s copyright ownership of the tapes. The lead counsel assigned to the case were J. Michael Weston (“Weston”) and Casey S. Erick (“Erick”) (collectively, “Defendant Attorneys”).

14. Lamentably, Defendant Attorneys' gross mishandling of Cooper's case became a comedy. It reached a point that the Law Firm's constant flubs in Federal Court garnered more press attention than the lawsuit itself. The federal Judge even refused to consider at least one of Cooper's dispositive filings because it was so poorly written and failed to conform to the local rules ("This Court does not reach the substance of Cooper's arguments, however, because Cooper fails to comply with the Court's procedural requirements..." Document 171).

15. Beyond the numerous and various legal errors made by Defendant Attorneys, they committed a major blunder that jeopardized the outcome of the case: they pled a cause of action for copyright infringement when the case should have been pled as a declaratory action to establish that Cooper held the copyright by operation of law. To make matters worse, the infringement claim was dropped during the course of the proceedings, leaving only a tenuous breach of contract claim to go forward on at trial. By that point, the Order on Harvey's Motion in Limine had eviscerated all compelling evidence to present to the jury (Document 214). Not surprisingly, the jury did not find in Cooper's favor. In the process, regrettably, Cooper's attorneys had opened him up to exposure for counterclaims that would have been barred if they had not brought forth the breach of contract claim and competently prosecuted a declaratory judgment under the Copyright Act.

16. On January 26, 2017, following the jury verdict, Defendant Attorneys imprudently advised Cooper to enter into a settlement agreement with Harvey. The settlement agreement included a waiver of Cooper's right to appeal the jury's verdict and to waive any existing rights to the videotapes. By signing the agreement, Cooper relinquished his copyright ownership rights under the Copyright Act – a right which he held by law up to that point. According to the damages expert retained by Defendant Attorneys, the potential revenue loss to Cooper ranged between

\$864,396.00 to \$4,321,980.00, using a damage model based on a limited selection of the tapes (i.e., five DVDs). The full catalog would have likely earned even more.

**B. THE CASE WITHIN THE CASE**

17. In 1993, Cooper produced films and video advertising doing business as Close-Up Video Productions. Cooper and Harvey reached an agreement in that Cooper would film Harvey's performances at Steve Harvey's Comedy House. The videos would be used to create a reel of footage that would be shown at the club to promote the club and upcoming performances. A video invoice and negotiated check showed that Cooper charged \$2,000 to film the footage. The video invoice provided that Cooper would "produce videotapes of promotional material from the facility including interior shots, audience, stage performances, and graphics with official logos." The invoice stated that the videotapes would "also include names, dates and music soundtracks ... [and] be looped for continuous play before, during and after show performances." The video invoice further provided that "the studio reserves the right to use the original tape and/or reproductions for display, publication or other purposes" and that the "[o]riginal videotapes remain the exclusive property of the studio." But Harvey denied signing this video invoice or ever having any written contract with Cooper. However, Harvey didn't dispute that he had a verbal agreement to video his performances at the club and that he paid Cooper \$2,000 to film and edit the footage.

18. In the end, Cooper filmed Harvey's performances resulting in more than 100 hours of video footage. Cooper filmed the videos with his own cameras. Harvey paid Cooper without providing Cooper with any employee benefits or paying any of Cooper's taxes. It is abundantly clear that Cooper was an independent contractor and there is nothing memorializing a work for hire arrangement. Therefore, the copyright in the footage is invested in Cooper.

19. Cooper began to market the videos of Harvey's performances in 1998. In October 1998, Harvey's counsel sent a cease and desist letter to Cooper stating that "Mr. Harvey has not relinquished any copyright interest to his performances for Joe Cooper's exploitation." On November 8, 1998, Cooper's lawyer at that time, Jasper C. Rowe ("Rowe"), responded to this letter asserting, among other things, that Cooper had copyright ownership in the videos as a matter of law under the Copyright Act. More specifically, Rowe correctly noted:

The U.S. Copyright laws changed in 1989 to grant persons creating artistic works like tapes a copyright ownership in the work created by operation of law. This change in the copyright law was made in order to harmonize U.S. Copyright law with international copyright law. It is thus clear that Mr. Cooper owns the copyright in the over 100 hours of tapes taped at the Steve Harvey Comedy Club.... In response to your threat to file a lawsuit against Mr. Cooper seeking injunctive relief, we respond that such an action would be ill advised, since Mr. Cooper is proceeding in conformity with U.S. Copyright Law.

20. In 2012, Cooper entered negotiations with MVD to distribute the first of the five volume of the videos. Harvey's attorney sent letters to Cooper stating that he did not have the right to use the recorded footage and demanded that Cooper cease and desist from communicating to the public that he was marketing the video. Cooper disclosed this dispute with Harvey about his rights to sell the videos to MVD as they were negotiating the distribution contract. MVD later wrote a letter to Cooper informing Cooper that Harvey's attorney stated Cooper did not have the right to sell or distribute the tapes, and Harvey would sue if MVD distributed Cooper's footage. Because of Harvey's threats, Cooper was unable to negotiate an agreement with MVD or anyone else to distribute the videos.

21. The Copyright Act creates copyright ownership interest as a matter of law in the person filming the footage. "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord ... is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."

*Ray v. ESPN, Inc.* 783 F.3d 1140, 1143 (8th Cir. 2015) quoting 17 U.S.C. § 101. Cooper’s filming of Harvey’s performances created an original work of authorship fixed in a tangible medium. *Ray v. ESPN, Inc.* 783 F.3d 1140, 1143 (8th Cir. 2015) citing 17 U.S.C. §§ 101, 102(a) (filming of professional wrestler’s performances “clearly generated” an “original work[...] of authorship.”). As a copyright owner, the Copyright Act granted Cooper “the exclusive rights to do and to authorize” the: reproduction of the copyrighted work; preparation of derivative works based on the copyrighted works; and, to distribute copies “of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” 17 U.S.C.A. § 106(1)-(3) (West). *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 546–547, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985).

22. 17 U.S.C.A. § 204(a) (West) provides that “[a] transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner’s duly authorized agent.” 17 U.S.C.A. § 204(a) (West); *Professional Portable X-Ray, Inc. v. Nelson*, 301 F.Supp.3d 943 (D. Minn. 2018). Furthermore, 17 U.S.C.A. § 202 (West) provides:

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

23. As such, Defendant Attorneys’ attempt to pursue this matter as a breach of contract was futile because, even if Cooper prevailed on the breach of contract claim, that would only establish ownership of the physical tapes and not the copyright itself. A declaratory judgment regarding the copyright ownership would still be needed. However, this distinction seems to have been lost on Defendant Attorneys, resulting in incorrect advice being given to Cooper to relinquish

his rights in the copyright after losing the breach of contract claim. The applicable law is well-established that “[o]wnership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.” 17 U.S.C. § 202; *Professional Portable X-Ray, Inc. v. Nelson*, 301 F.Supp.3d 943, 947 (D. Minn. 2018). Accordingly, “[t]ransfer of ownership of any material object, including the copy ... in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object[.]” 17 U.S.C. § 202; *Professional Portable X-Ray, Inc.* 301 F.Supp.3d at 947. Furthermore, a transfer of copyright ownership “is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed[.]” 17 U.S.C. § 204(a); *Professional Portable X-Ray, Inc.*, 301 F.Supp.3d at 949 (D. Minn. 2018). Because copyright ownership initially vests in the author of the work and conveyance of a copyright ownership is distinct from a conveyance of ownership in the material object embodying the copyright material, “the terms of any writing purporting to transfer underlying copyright interests must be clear.” *Professional Portable X-Ray, Inc.*, 301 F.Supp.3d at 949 (D. Minn. 2018) quoting *Papas’-June Music, Inc. v. Mclean*, 921 F.Supp. 1154, 1158-59 (S.D.N.Y. 1996). This protects an author from “inadvertently transfer[ing] copyright ownership.” *Professional Portable X-Ray, Inc.*, 301 F.Supp.3d at 949 (D. Minn. 2018) citing *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990). Therefore, a writing won’t “transfer copyright ownership unless it is clear and unequivocal.” *Professional Portable X-Ray, Inc.*, 301 F.Supp.3d at 949 (D. Minn. 2018) citing *Wenstien Co. v. Smokewood Entm’t Grp., LLC*, 664 F.Supp.2d 332, 340 (S.D.N.Y. 2009). For example, it was held that a written agreement stating software “shall be the property” was not sufficiently clear and unequivocal to transfer copyright ownership of the software. *Professional Portable X-Ray, Inc.*, 301 F.Supp.3d at 949 (D. Minn. 2018)



24. A declaratory action establishing Cooper's rights under the Copyright Act would have allowed Cooper to move forward with a distribution deal. Based on undisputed facts and the law, Cooper would have, more likely than not, prevailed in such an action.

25. All the above allegations are incorporated below for all purposes.

#### **IX. CAUSE OF ACTION FOR NEGLIGENCE BY ATTORNEY**

26. Cooper and Defendants established an attorney client relationship.

27. Defendants breached the duty of care that arose from the attorney-client relationship by:

- a. Failing to plead the correct cause of action against Harvey;
- b. Failing to establish Cooper's copyright ownership under the Copyright Act through a declaratory judgment action;
- c. This establishment of Cooper's copyright ownership would have rendered Harvey's counterclaim for misappropriation meritless; and
- d. Advising Cooper to enter into a settlement agreement which included a waiver of Cooper's right to appeal the jury's verdict and extinguished his rights to ownership of the videotapes.

28. Defendants' acts led to Cooper's loss of copyright ownership under the terms of the settlement agreement. This loss caused Cooper to suffer significant economic damages. Thus, Cooper seeks unliquidated damages within the jurisdictional limits of this court.

29. Cooper invokes the rule of *Hughes* and its progeny which provides that "when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on the malpractice claim against the attorney is tolled until all appeals on the

underlying claim are exhausted.” *Hughes vs. Mahaney & Higgins*, 821 S.W.2d 154 (Tex. 1991); *see also Apex Towing Co. v. Tolin*, 41 S.W.3d 118 (Tex. 2001).

## **X. DAMAGES**

30. Plaintiff is entitled to each of the following elements of damages.

- a. The total amount of economic damages suffered by Plaintiff in the loss of his copyright ownership;
- b. Fees and/or expenses paid to Defendants in all cases where Plaintiff was represented by Defendants;
- c. Attorney’s fees and Mediator’s fees incurred to try and correct Defendant’s negligence;
- d. Attorney’s fees incurred in this litigation, to the extent permitted by law;
- e. Costs of Court; and
- f. Any and all other damages at law or in equity.

31. All the above damages exceed the minimal jurisdictional limits of this court. Plaintiff will rely on the evidence and jury or fact finder to determine the reasonable amount of such damages.

## **XI. INTEREST**

32. Plaintiff is entitled to recover all prejudgment and post-judgment interest which has and will accrue to accordance with the law. Thus, Plaintiff hereby seeks recovery of all pre-judgment and post-judgment interest at the maximum interest rate allowed by law.

## **XII. REQUESTS FOR DISCLOSURE**

33. Pursuant to Tex. R. Civ. P. 194, you are requested to disclose, within fifty (50) days of service of this request, the information or material described in Tex. R. Civ. P. 194.2.

### **XIII. PRAYER**

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that citation and notice be issued in accordance with law and that upon final trial or hearing hereof that he receive judgment against the Defendants including actual damages, prejudgment and post-judgment interest at the maximum interest rate allowed by law, including attorneys' fees, statutory damages, costs of court, and all other and further relief, general and special, at law and in equity, to which Plaintiff may show himself justly entitled.

Respectfully submitted,

/s/ Nick Oweyssi

Nick Oweyssi (Lead Counsel)

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